United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 77-4121

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MILGO INDUSTRIAL, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FILED
SEP 14 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to negotiate with the Union in good faith.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board for enforcement of its order (A. 631-650)[1/] against

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1/ Record references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those followings are to the supporting evidence.

Milgo Industrial, Inc. (hereafter "the Company"). The Board's Decision issued April 18, 1977, and is reported at 229 N.L.R.B. No. 13. The Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151 et seq.), the unfair labor practices having occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (hereafter "the Union"). As demonstrated below, the Board found that the Company showed its intention not to reach an agreement by making itself unavailable for regular bargaining meetings, haggling at length over minor contract issues, being intransigent in its bargaining position, and failing to supply the Union with two necessary pieces of information.

A. Background

The Company is a New York corporation located in Brooklyn, New York, which produces, sells, and distributes metal construction items, metal sculpture, and related products. (A. 632) It has between 13 and 20 employees. (A. 636-637; 653-54, 733, 816)

In the latter part of September 1971, the Union began an organizational campaign among the Company's employees, and, about October 1, 1971, demanded recognition as the employees' bargaining representative. This request for recognition was refused and the Company embarked upon a course of illegal

conduct designed to rid itself of the Union. The Board thereafter found the Company guilty of unfair labor practices. Milgo Industrial, Inc. 203 NLRB 1196 (1973). On June 11, 1974, this Court granted enforcement of the Board's order requiring the Company to bargain with the Union. (A. 632)[2/]

B. Negotiations

Shortly after the issuance of this Court's June 11 order, the Union, by letter of July 1, 1974, requested the commencement of negotiations. (A. 633; 651) Three weeks later, on July 24, the Company's attorney responded to the Union's request and a first meeting was scheduled for August 8 - approximately one month later than the date the Union first proposed. (A. 633; 25-26, 652)

At the August 8 first negotiating session, and throughout negotiations, the Company was represented by its attorney David Tolmach, who attended all the meetings, and (to a lesser extent) by its vice-president, Bruce Gitlin. The Union was represented by its president, William Colavito. (A. 633; 27, 413, 535) At this first session, the Union presented its proposed contract. The Union's proposed contract called for: (1) a substantial increase in pay (2) commonly funded plans for health, pension, sick leave, annuity, and apprentice-training benefits financed by the Company and applicable to all employees (3) 13 holidays (4) industrywide vacation benefits of one week's vacation after one year's service in the industry, two weeks after two years, and three weeks after three years (5) overtime pay of time-and-a half beyond regular shift hours, double-time for weekends,

2/ Nos. 73-2242, 73-2463

and triple-time for holidays and (6) severance pay. (A. 633; 33, 656-728) The parties briefly discussed some of the details of the proposed contract and the Company asked for time to digest the proposal. A. 633; 38-40) At the session's end, Colavito asked the Company if it could try to expedite negotiations. Nothwithstanding this request, Tolmach failed to call back to arrange a date for the second negotiating session as promised and was unavailable for a second meeting for approximately a month. (A. 633-34, 41-44)

The second negotiating session took place on September 9. At this session the Company and the Union went over the Union's proposed contract clause by clause. The Company raised objections to essentially all of the 33 proposed contract sections and stated that it was flatly opposed to the Union's health, pension, sick leave, annuity and training benefits proposals and would stick by its current employment terms. The Company refused to include "age" as one of the categories in the proposed non-discrimination clause over the Union's protest that age discrimination was prohibited by federal law, opposed a proposed bulletin board provision giving the Union the right to post materials "relating to Union matters", refused to accept a plant visitation provision which gave Union representatives the right to enter the plant for purposes of investigating complaints and working conditions, and objected to giving the proposed safety committee (to be composed of one management and one union representative) the power to halt work because of hazardous conditions. In addition, the Company opposed giving stewards preferential assignment of overtime, which would have permitted a union representative to be on the

job at all times, and objected to a provision requiring it to keep payroll records for a period of three years--a provision which was a close approximation of federal requirements. All discussion of monetary items was deferred until the Company made an economic counter-proposal. (A. 634; 56-96)

The next meetings were held on September 20, October 7, October 17, November 4, November 12 and November 22. During these meeting Colavito pressed for early meeting dates and for longer meetings, but was inevitably forced to take whatever date Tolmach, the Company's busy representative, could arrange. This pattern continued for the rest of negotiations, (A. 644; 98-99, 131=133, 139-141, 158-160, 171-72, 294, 312, 320, 344)

At the September 20 meeting, the Company handed the Union its first set of counterproposals which reflected for the most part the existing level of benefits. (A. 634; 101-103, 354-355, 551-52, 757-782) No agreements were reached at this meeting (A. 634; 100) At the October 7 and October 17 meetings the parties again got nowhere as they continued to go over the proposed Union contract, with the Company reiterating many of its earlier objections. (A. 634; 117, 120-131, 134-38)

On November 4, the Company made its first economic offer--a 10 cent wage increase which was to include any improvement in fringe benefits. At this session, the parties discussed various sections of the proposed contract and made some movement towards agreement on the seniority, leave of absence, and safety proposals. The parties reached full agreement on the proposed savings clause after the Union agreed to a minor change in the language. (A. 634-35; 142-159, 561) The Union asked for the revised

cost of the Company's pension plan and for a copy of its Blue Cross-Blue Shield plan. The Union renewed this request at a number of subsequent meetings but the Company never supplied this information. (A. 634, 636, 639, 640, 644; 156, 346, 487, 515-518)

On November 12, the Company raised its wage offer to 25 cents an hour and agreed to extend its health coverage to employees who had worked for the Company for more than one year. Colavito protested that the 25-cent offer was less than the raise in the cost of living experienced by the employees. The parties reached no agreements at this meeting. (A. 635; 161-171)

On November 22, the parties continued their discussion of the Union's proposals. Partial agreement was reached on the hours of work, overtime, and holiday contract sections and full agreement was reached on an arbitration clause. (A. 635; 172-178) At the end of the meeting, Tolmach stated that he wanted "two or three weeks" to prepare a new draft incorporating the agreements; this draft was forwarded to the Union some seven weeks later. The Company cancelled a meeting scheduled for February 14, 1975, postponing the next meeting to March 3, 1975--a more than three month hiatus in the negotiations. (A. 635-636; 179-182, 277-280, 566-567, 618, 730, 783, 784-814)

The parties met, as planned, on March 3 and again on March 14, March 26, April 18, and May 2. At the March 3 meeting, the Union relaxed its stance on the bargaining unit clause and lowered its holiday demand, but failed to gain Company agreement on these clauses. The parties did, how-

ever, reach agreement on a checkoff proposal after the Union accepted a Company proposed modification. In addition, the Company at this meeting made a counterproposal on union security. (A. 636; 280-293, 815) On March 14, the parties discussed a number of contract sections but no agreement was reached. (A. 636; 300-306) On March 26, the Union tried but failed to gain Company acceptance of a compromise vacation proposal. The parties also discussed the proposed plant visitation clause and the Company's insistence on a 120-day probationary period for new employees. (A. 636; 306-312)

On April 18, 1975, the parties discussed the proposed bargaining unit, recognition, wage, funeral leave, and union security clauses without making progress. A good deal of time was spent discussing the Union's concern that Company intransigence on the proposed subcontracting and bargaining unit clauses signified a Company intention to subcontract its work and avoid unionization. (A. 638; 312-320)

At the May 2 meeting the parties discussed pro rata vacation benefits, probationary periods, the frequency at which the safety committes should meet, and a wage scale for field fabrication work without making any headway on these issues. (A. 638; 322-29)

The parties did not meet again for approximately four weeks because meetings, originally set for May 9 and May 20, were cancelled. The Union was responsible for cancelling the May 9 meeting, while the responsibility for the other cancellation was sharply disputed by the parties. (A. 638; 327-29, 490-493, 586-587)

The next meeting was on May 29. At this meeting, the parties had before them a new set of draft counterproposals which the Company sent the Union on May 15. In these proposals, the Company modified the bargaining unit clause and the plant visitation clause to the Union's satisfaction; apparent agreement was consequently reached on these two sections. The Company also made concessions on some clauses in the seniority section but stiffened its requirements concerning the time given laid-off employees to report back to work. (A. 638-39; 590, 818-827) The parties discussed reporting pay, probationary periods, leaves of absence, and wages with neither side changing its position. The Union proposed a trade-off on the leave of absence and probationary period proposals, but the Company stated that it was not interested. (A. 639; 330-337)

The next meeting was set for June 19 but was cancelled. Colavito could not have attended this meeting in any event. (A. 640; 338-39, 497-501, 591-592)

After this, a meeting was set for July 11. At this meeting, the parties reached agreement on the bulletin board proposal and on a portion of the leave of absence proposal and also discussed other matters, without resolving anything. (A. 640; 592-94)

Colavito arrived for the next meeting, which was scheduled for July 24, only to find that it had been cancelled. Tolmach apologized by phone for cancelling the meeting and promised to call back the next day and arrange a new meeting date. He did not call back, and the Union,

after trying unsuccessfully to reach Tolmach by phone, sent him a letter on August 12 requesting a response. Tolmach responded on August 18 that due to his "heavy case load" he could not meet again until early September --an almost two month delay. (A. 640; 340-343, 731, 732)

The last two negotiating sessions occurred on September 11 and September 30. Nothing was resolved at either meeting. (A. 640; 343-46, 348-49).

Throughout this time, the Company experienced considerable turnover with the result that only a few of the original Union supporters remained. (A. 636-37; 654, 755-56, 816) On September 23, a decertification petition was filed by Company employees. At the September 30 meeting, the Company stated that due to the fact a decertification petition had been filed, it was not going to participate in negotiations any longer. After this, no more meetings were held. (A. 640; 348-49, 600-601)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Company had violated Section 8(a)(5) and 8(a)(1) of the Act by failing bargain in good faith with the Union. The Board's order requires the Company to bargain with the Union and to supply the Union with information necessary to its collective bargaining. The order also requires the Company to cease and desist and from interfering, with, restraining, or coercing its employees in any like or related manner and to post the usual notices. (A. 645-46)

ARGUMENT

THE COMPANY VIOLATED SECTION 8(a)(5) AND 8(a)(1) OF THE ACT BY NEGOTIATING IN BAD FAITH WITH THE UNION

A. General Principles

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees. . ." The collective bargaining obligation imposed by this section is defined by Section 8(d) of the Act as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder. . . ." Since a refusal to bargain in good faith coerces employees in the exercise of their rights under Section 7 of the Act "to bargain collectively through representatives of their own choosing," such a refusal constitutes a violation of Section 8(a)(1) of the Act as well.

This Court set forth the principles concerning good faith bargaining in Continental Insurance Company v. N.L.R.B., 495 F. 2d 44, 47-48 (1974):

> The duty imposed on the parties under § 8(a)(5) to bargain collectively does not obligate a party to make concessions or yield a position fairly maintained, N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 404 (1952); N.L.R.B. v. Patent Trader, 415 F. 2d 190 (C.A. 2, 1969), modified, 426 F. 2d 791 (C.A. 2, 1970); N.L.R.B. v. General Electric Co., 418 F. 2d 736, 756 (C.A. 2, 1969), cert. denied, 397 U.S. 965, rehearing denied, 397 U.S. 1059. On the other hand, the parties are obligated to do more than merely go through the formalities of negotiation. There must be a "serious intent to adjust differences and to reach an acceptable common ground," N.L.R.B. v. Insurance Agents Union, 361 U.S. 477, 485

> (1960). To conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would of course violate § 8(a)(5) and amounted to "bad faith" bargaining. Sophisticated pretense in the form of apparent bargaining, sometimes referred to as "shadow boxing" or "surface bargaining," see N.L.R.B. v. Herman Sausage Co., 275 F. 2d 229, 232 (C.A. 5, 1960), will not satisfy a party's duty under the Act: and where years pass without an agreement being reached, the conduct of the parties must be scrutinized carefully, especially when experience discloses that collective bargaining agreements are usually reached in a fraction of that time.
>
> The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a "bad faith" intention, his motive must of necessity be ascertained from circumstantial evidence, N.L.R.B. v. Patent Trader, supra, 415 F. 2d at 197 (C.A. 2, 1969). . . [T]he determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic. N.L.R.B. v General Electric Co., supra, 418 F. 2d at 756.

In deciding whether a party has bargained in good faith, "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inference to be drawn from what is often confused and tangled testimony . . . makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation." N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring in part and dissenting in part.)

B. Bad Faith Conduct

As shown in the statement of facts, the Company recognized the Union as required by the prior order of this Court, but failed to bargain in good faith.

A brief recepitulation of the evidence discloses substantial support for the Board's finding that the Company's negotiating stance was characterized by delaying tactics, including the refusal to meet frequently with the Union and the refusal to furnish certain information requested by the Union. Furthermore, the nature of the positions taken by the Company at the negotiating table shows a lack of a serious intention to to reach an agreement.

Unreasonable delay or postponement of bargaining meetings violates the good faith duty to meet at reasonable times and at reasonable intervals with the other party and serves as one of the clearest indicia of a party's approach to bargaining. N.L.R.B. v. Fitzgerald Mills Corporation, 313 F. 2d 260 (C.A. 2, 1963), cert. denied, 375 U.S. 834. N.L.R.B. v. National Shoes, Inc., 208 F. 2d 688, 692 (C.A. 2, 1953). It is no defense to the charge of dilatory tactics that other business obligations prevent more frequent meetings. "[T]he busy outside schedule of a negotiator-attorney 'does not exempt the employer from the normal requirements that nothing be done for the purpose of stifling an opportunity for discussion. . . . There remains on the employer the positive legal duty to meet and confer with the Union at reasonable times and

intervals.'" A.H. Belo Corporation (WFAA-TV) v. N.L.R.B., 411 F. 2d 959, 968 (C.A. 5, 1969), cert. denied, 396 U.S. 1007 quoting N.L.R.B. v. Exchange Parts Company, 339 F. 2d 829, 832 (C.A. 5, 1965).

The evidence fully supports the Board's finding that the Company, in the face of the Union's request for longer and more frequent meetings, engaged in delay tactics. Throughout negotiations, Colavito, the Union's representative, sought more frequent meetings than Tolmach, the Company representative, was able to arrange. Tolmach, who admitted that he is usually out of town two to three days a week, almost invariably pleaded the press of other business as an excuse. (A. 643; 43-44, 98-99, 131-133, 139-141, 158-160, 171-72, 294, 312, 320, 340-344, 623, 730, 731, 732 The Company's attitude was foreshadowed early on at the second negotiating session when Colavito, at the end of the session, asked if the Company could expedite the meetings; Tolmach responded that he would try, but that he was a "busy guy." (A. 643; 41-42)

As a result of Tolmach's unavailability, the negotiations were saddled with significant delays. The first negotiating session was delayed for five weeks because of the Company's failure to respond promptly to the Union's July 1, 1974 request for bargaining. Similiarly, the second session was delayed for a month due to Tolmach's inaccessibility (Tolmach said he was going on vacation.) Meetings which were held September 20, October 7, October 17, November 4, November 12, and November 22, 1974 were followed by a three month delay attributable to the Company's dilatoriness in preparing new draft contract proposals and to Tolmach's unavailibility. In

addition, Tolmach's purportedly "heavy case load" after the parties' July 11, 1975 meeting resulted in the cancellation of a proposed July 24 meeting and a two-month delay. Although Colavito bore responsibility for the cancellation of two meetings, the impact of this delay, totalling approximately a month and a half, does not compare to the delay caused by the Company (especially when it is considered that the Company delay came early, at the most sensitive point in the negotiations.) The long delays, coupled with the Company's inability to meet with reasonable frequency, greatly impaired the prospect for reaching agreement. Over the course of 15 months, the parties met only 17 times. These few, scattered meetings, punctuated as they were by Company caused hiatuses of one month (twice), two months, and three months, reflect a cast of mind bent on avoiding agreement.

3/ In its exceptions to the Board, the Company objected to certain of the Administrative Law Judge's credibility resolutions. However, as this Court has said, "questions of credibility are for the trier of fact" and will not be upset "unless on [their] face [they are] hopelessly incredible or flatly contradict either a so-called 'law of nature' or undisputed documentary testimony." N.L.R.B. v. Warrensburg Board & Paper Corporation, 340 F. 2d 920 (C.A. 2, 1965) quoting N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952). See also, MPC Restaurant v. N.L.R.B., 481 F. 2d 75, 77 (C.A. 2, 1973). The Company confined its objections to the Administrative Law Judge's crediting of Union witness Colavito's testimony. It argued that Colavito's unreliability as witness was demonstrated by the fact that (1) Colavito testified to some items which were not mentioned in his affidavit to the Board or in his personal notes of the bargaining session (2) Colavito contradicted himself several times. There is clearly no merit to the Company's first objection since it is inconceivable that Colavito could have incorporated everything mentioned in his approximately 500 pages of transcript testimony into the comparatively few pages of his Board affidavit and his personal bargaining session notes. (See A. 837-883) Moreover, a fair reading of the testimony reveals that, although

(Footnote Continued)

Another factor which retarded negotiations was the Company's failure to supply the Union with two important pieces of information. Employers have a general obligation to provide information which is necessary and relevant to the bargaining representative's performance of its duties. N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956); N.L.R.B. v. General Electric Co., supra, 418 F. 2d at 749-753; N.L.R.B. v. Yawman & Erbe Mfg. Co., 187 F. 2d 947, 949 (C.A. 2, 1951). Consequently, the refusal to supply such information will support a finding of refusal to bargain in good faith. N.L.R.B. v. Truitt Mfg. Co., supra, 351 U.S. 149.

Although the Company, for the most part, complied with many of the Union's requests for information, the Company failed, in spite of many requests from the Union, to supply the Union with a copy of the Company's welfare (health) plan and the revised costs of the Company's pension plan under ERISA. (A. 644; 34, 156, 284, 316, 346, 400-401, 487, 515-518). [4/] This failure to supply necessary information as to the revised costs of the pension plan and the benefits offered by the Company health plan hampered negotiations over the proposed pension and health plans. The Union needed this information to formulate an intelligent response to

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3/ a few superficial contradictions do exist, these can be attributed to the difficulty inherent in remembering with exact precision everything which occurred over the course of 15 months of bargaining.

4/ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (1974) (This legislation, enacted on September 2, 1974, places certain restrictions on employee pension plans. The passage of ERISA rendered obsolete the pension costs which the Company, at the outset of negotiations, gave the Union.

the Company's rejection of the Union's health and pension proposals. For example, the Union's ability to make informed and reasonable compromise proposals on the health and pension plan issues hinged on its capacity to evaluate the costs and benefits of the Company's pension and health plan. In addition, since the Company took the position that its offer would cover any increase in fringe benefits, the revised pension costs and health plan benefit were also needed by the Union to evaluate the Company's wage offer. Without this information, the Union was in no position to explore avenues for possible trade-offs or compromises in the total benefit package. N.L.R.B. v. General Electric Co., supra, 418 F. 2d at 749-753; N.L.R.B v. John S. Swift Company, 277 F. 2d 641, 643-645 (C.A. 7, 1960).

The foregoing shows that the Company utilized tactics designed to delay the negotiations as long as possible. Prolonging negotiations generally serves to undermine a union's strength, as it leaves the employees frustrated by the union's lack of success and allows turnover (which was heavy of the Company) to deprive the union of many of its initial supporters. The Company's combined postponement of meetings and its refusal to supply relevant information requested by the Union both serve to support the Board's inference that the Company's objective was to delay and frustrate the bargaining process.

The Company's design was also accomplished by its practice of insisting on extensive discussion about insignificant details in contract proposals and by withholding its consent to minor terms as a bargaining ploy. Thus, throughout the negotiations the Company withheld agreement on relatively minor contract proposals and raised numerous objections, with the result

that much time was spent on insubstantial contract issues. And even where the Company later capitulated on certain of its objections to the Union's proposals, it did so only after having succeeded in postponing agreement for a considerable length of time.

The Company's intransigence and tendency to raise minor objections was demonstrated by the following:[5/]

(1) The Company refused at the outset to include "age" as one of the protected categories in the proposed non-discrimination clause, despite the Union's objection that age discrimination is prohibited by federal law. (A. 83) (see 29 U.S.C. § 621 et seq. (1967)) Such a refusal to incorporate a statutory obligation into the contract has been

5/ The set of events making up the parties' negotiations occurred over a period of 15 months. The Company before the Board objected to Board reliance on negotiating events occurring prior to the Section 10(b) period for purposes of establishing that the Company did not bargain in good faith. Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The charge in the present case was filed on October 1, 1975; consequently, the 10(b) period reaches back to April 1, 1975. Evidence of events occurring prior to April 1 is, however, admissible for the purpose of shedding light on the "true character of matters occurring within the limitations period." Local Lodge No. 1424, etc. v. N.L.R.B. 362 U.S. 411, 416-417 (1960); N.L.R.B. v. National Shoes, Inc., supra, 208 F. 2d at 692. For example, many, if not most, of the trivial objections which the Company made to the Union's bargaining proposals-objections which support the inference of Company intransigence-were raised by the Company both before and during the Section 10 (b) period. Evidence of these objections may, therefore, be directly relied upon to show bad faith bargaining. Evidence of the Company's delay--even that which occurred before April 1, 1975--may likewise be relied upon, inasmuch as this delay strongly influenced negotiations within the Section 10(b) period. As this Court has said, "The collective impact of long delay, found in part from evidence outside the six-month period, would be a proper basis for a finding by the N.L.R.B. that bargaining was not conducted in good faith." N.L.R.B. v. Fitzgerald Mills Corporation, supra, 313 F. 2d at 264.

held to be evidence of bad faith. N.L.R.B. v. Reed & Prince Mfg. Co., supra, 205 F. 2d at 137.

(2) The Company refused till the latter part of negotiations to agree to a bulletin board provision giving the Union the right to post notices "relating to Union matters", insisting instead that posted materials be cleared with it and that they be confined to "official matters". (A. 84-85 696, 777, 806, 827) See N.L.R.B. v. Reed & Prince Mfg. Co., supra, 205 F. 2d at 136, 139.

(3) The Company for a long time refused to agree to a plant visitation provision giving Union representatives the right to enter the Company's premises for the purpose of investigating complaints and working conditions, objecting that a Union representative's presence would constitute "interference". As a counterproposal, the Company insisted that the representative make an appointment before visiting and implicitly reserved for itself the right to deny visitation privilieges. (A. 75, 136-137, 309-310, 682, 770, 799) The matter was finally settled in May 1975 when the Company agreed to compromise language. (A. 819)

(4) The Company insisted, as virtually the only obstacle to agreement on a leave of absence proposal, that the employees take funeral leave from the date of death rather than at such time as they chose to take it. The Union attempted to obtain agreement on May 29, 1975, by offering to accept the Company's funeral leave proposal in exchange for Company acceptance of the Union's 45 day probationary period proposal but the Company stated it was not interested in "trade-offs". (A. 82, 302-304, 332, 689-690, 773-774, 802-803)

(5) The Company refused to give the proposed safety committee (consisting of one management representative and one union representative) the power to halt work because of hazardous conditions. This matter was settled when the Union agreed to a compromise provision calling for the expedited arbitration of safety disputes. Later, however, the Company, in an new tack, objected to the proposed requirement that the safety committee meet once a month, insisting instead that the committee meet "periodically." (A. 85-86, 154, 325, 697-98, 778, 807, 820)

(6) The Company objected to a provision in the safety section requiring it to provide a water cooler, substituting in its place a provision requiring it to provide "water". When asked by the Union on March 14, 1975, what the Company meant, the Company responded that it was agreeing to provide water through its taps. (A. 300-301, 698, 778, 807, 820)

(7) The Company adamantly refused to giving the shop steward preferential assignment of overtime--a proposal which would have allowed a union representative to be on the job at all times. (A. 65, 129, 672, 761, 790)

(8) The Company took exception to the proposed pay day provision requiring the Company to keep its "time cards and all other payroll records" for three years. The Company counterproposed as a substitute for the Union's proposal a provision requiring it to keep payroll records for as long as required by the "Wage-Hour Laws". (A. 92, 702, 778(a), 808) The Department of Labor Regulations, 29 C.F.R. § 516.5 and §516.6 (1976), require an employer to preserve all his basic payroll records for at least three years, with the

exception that supplementary basic records, such as time cards or time sheets need only be kept two years. These regulations thus require substantially the same record keeping as that first proposed by the Union.

(9) The Company objected to a proposed five minute wash-up period at the end of the day. (A. 709, 780, 810)

As the Board observed, the above demonstrates that the Company engaged in "a course of nit-picking" conduct. (A. 642) Thus, as shown above, the Company took quibbling exception to proposals reflecting commonly accepted and presumably non-controversial industrial practices (the bulletin board proposal), was unnecessarily quarrelsome over relatively insignificant matters (the funeral leave, safety committee, water cooler, pay day, and wash-up period proposals), was opposed to provisions essential to the Union's performance of its function as bargaining representative (the plant visitation and preferential overtime proposals) and refused for a time to put into the contract matters mandated by law (the non-discrimination proposal). Moreover, the Company's declaration that it was not interested in "trade-offs" displays an attitude inimical to the whole concept of bargaining.

The proposals and positions which the Company took regarding major contract issues supply additional evidence of the Company's insincerity. Continental Insurance Company v. N.L.R.B., supra, 495 F. 2d at 49-50; Vanderbilt Products, Inc. v. N.L.R.B., 297 F. 2d 833 (C.A. 2, 1961); N.L.R.B. v. Reed & Prince Co., 205 F. 2d 131, 134 (C.A. 1, 1953), cert. denied, 346 U.S. 887. During the entire negotiating period, the Company

and the Union did not resolve a single economic issue. The Company insisted, over the Union's protest, upon maintaining the economic status quo regarding vacations (A. 635; 144, 164, 305, 307-308, 560, 563-564, 655, 730, 776, 805) holidays (A. 176-177, 291, 729, 730, 762, 791), overtime (A. 63-64, 761, 790) pensions (A. 95-96, 730) and health benefits[6/] (A. 95-96, 730) and stuck to its initial proposals regarding vacations and holidays even after the Union offered a compromise. The Company did not make a wage proposal until near the end of the third month of bargaining. The Company then offered a wage increase (which was to include any improvement in fringe benefits) of ten cents an hour. (A. 143, 561) If this offer were considered as applying to wages alone, it would amount to and increase of only 2.5 percent, which was substantially less than the wage increase the employees had enjoyed for the previous two years. (A. 634; 654, 755-56) Wage increase proposals such as this, which offer less than the employees had received in previous years and which, like this one, make no provision for retroactivity, have been considered to be evidence of failing to bargain good faith by this Court. See, Continental Insurance Co. v. N.L.R.B., supra, 495 F. 2d at 49. The Company shortly thereafter raised its wage increase proposal (which was to cover increases in benefits as well) to 25 cents, an increase approximately equalling the employees previous annual pay increases (A. 755-56). Furthermore,

6/ The only real improvements proposed by the Company in its health and pension plans was its proposal to extend its health coverage to employees after one years' service. (A. 162-63, 730)

the Company also rejected the Union's proposed union shop provision. The Company counteroffered with a modified maintenance of membership proposal, which would have permitted any employee to withdraw from the Union within 30 days after the contract's signing and within 30 days after the first year of the contract and, by its terms, provided that all employees be informed of their withdrawal rights. The Company's proposal, which gave every employee the opportunity to become a free rider immediately after the contract was signed, appears to have been made with the purpose of embarrassing the Union. (A. 643; 286, 574, 815)

The consequence of the Company's bargaining attitude was that very little headway was made during the 15 months of negotiations. After six negotiating sessions, full agreement had been reached on only two of the 33 proposed contract sections--the savings provision (which was largely a formality) and (apparently) the provision forbidding bonus work. (A. 634; 89, 93, 155) After 11 meetings, only one other contract section--the checkoff provision--had been agreed upon. (A. 636; 169-170, 666, 787). And after the full 17 meetings, only four more sections had been added to the list--a recognition clause, a bargaining unit clause, a plant visitation provision, and a bulletin board provision. (A. 638, 640; 593, 818-819, 827[7/]). The parties were thus far

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7/ Agreement had also been reached on an arbitration clause (but not on the rest of the workings of the proposed grievance and arbitration provision.) (A. 635; 178, 795-96)

apart at the time negotiations broke off following the filing of the decertification petition.[8/]

In sum, the Company was successful in its objective of delaying the negotiations and undermining the Union's support among the employees. The Company's unavailibility for meetings, its footdragging and intransigence during the bargaining sessions, and its refusal to furnish certain necessary information resulted in unduly protracted negotiations and the frustration of any prospect of reaching an agreement. Hence, the Company's overall conduct amply supports the Board's conclusion that the Company was bargaining in bad faith.

8/ The Board did not, in its decision, base its finding of bad faith upon the Company's peremptory halt of negotiations following the filing of the decertification petition. The Company cannot, however, rely upon the decertification petition to excuse it from further bargaining with the Union. Since the Company ceased bargaining in the context of its bad faith negotiations, its withdrawal or recognition was improper and constitutes no defense to a future bargaining order.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgement should issue enforcing the Board's order in full.

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August, 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4121
	)	
MILGO INDUSTRIAL, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief ~~and one (1) copy of the Appendix~~ in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.

this 24th day of August, 1977